THE WISCONSIN WORKMEN'S COMPENSATION LAW SUSTAINED

It must shock the legal sensibilities of the older constitutional lawyers to see how some of our courts today are breaking with the traditions of constitutional construction and the accepted limitations of the judicial veto power over legislation.

On November 14, 1911, the Supreme Court of Wisconsin in the case of *Borgnis et al.* v. *The Falk Co.*[1] sustained as constitutional a Workmen's Compensation Law passed at the session of the legislature of that state in the same year. The brevity of the time between the passage of the law and the decision is significant. As soon as the law was passed the above friendly suit was filed to test its constitutionality. It was an action in equity by an employee for an injunction to restrain his employer from electing to come under the provisions of the new law. There was no trial in the lower court, judgment being entered on the pleadings, so that the case could be at once brought to the Supreme Court. In that court the case was advanced on the calendar so as to get a decision on the question as early as possible.

This was so palpably a test case that the court could not but be aware of it. It is said (though it does not appear in the opinion) that such was the faot, and that the court paid its respects to the long-established tradition that constitutional questions cannot be settled by moot cases[2] by scolding the attorneys for bringing this suit. But other courts seem to permit this practice also of late; the Illinois Ten-Hour Law for Women was sustained in a similar friendly suit.[3]

However, in the Wisconsin case there is the additional fact that the constitutional question was not necessary to the decision of the case. The Court says, Winslow, Chief Justice, delivering the opinion:

It seems to be true that this action might very well be disposed of without considering the question of the validity of the act in question. Ordinarily

[1] 133 N.W. Rep., No. 3 of the Advance Sheets, p. 1.

[2] Willoughby, *On the Constitution*, 13 f.; Hall, *Constitutional Law*, secs. 37 f.

[3] *Ritchie* v. *Wayman*, 244 Ill., 509.

under such circumstances that course would be the proper one to pursue, for the question of the constitutionality of a statute passed by the legislature is not one to be lightly taken up, and generally such a question will not be decided unless it be necessary to decide it in order to dispose of the case. . . . . A considerable number of employers have accepted the terms of the act, but unquestionably many are waiting until the question of the constitutionality of the act be authoritatively settled by this Court. . . . . The situation is unquestionably one of much doubt and uncertainty among the great industries of the state, and it must remain such until this Court has spoken. Many employers of labor who have not accepted the law have taken that course, not because they have chosen definitely to decline the terms of the law, but because they do not know whether they will be protected if they accept and act under it. Such a condition of uncertainty ought not to be allowed to exist if it can be removed. This Court cannot properly decide questions which are not legitimately involved in bona-fide lawsuits, but it may properly decide all questions which are so involved, even though it be not absolutely essential to the result that all should be decided. . . . . Impressed with this view of our duty under the circumstances, we advanced the present case upon the calendar, and invited argument upon the main question as to the constitutionality of the statute, not only from the Attorney-General on behalf of the state, but from any attorney interested in the question. . . . . In either event there is no cause of action in equity, and no ground for an injunction; the complaint should have been dismissed on the pleadings.

It is apparent that the decision on the constitutional questions is really entirely *obiter dictum*. No one could really be injuriously affected by this law until an employee had been injured and had brought suit under it. Still the famous cases, *Marbury* v. *Madison*[1] and *Dred Scott* v. *Sanford*[2] are venerable transgressors in this respect. But, if the practice countenanced by the court in this case is to prevail—the practice of permitting a resort to equity, where none of the well-settled grounds of equitable intervention exist, for the sole purpose of settling the uncertainty of the constitutionality of a law—what objection can the courts then still have to the giving of advisory opinions to the legislature as to the constitutionality of proposed legislation, a plan perennially advocated by lay publicists? This would be still more expeditious, and such opinions could well be considered precedents as binding as an obiter decision. But our courts have refused to give such

[1] 1 Cranch, 137.

[2] 19 How., 393.

opinions[1] and have held that the uncertainty spoken of by the court above is an inherent and inevitable feature of our system of judicial determination of constitutionality of laws. Are we in a transition stage in the attitude on this question?

The Wisconsin Compensation Act,[2] unlike the New York act held unconstitutional in *Ives* v. *S.B. Ry. Co.*, 201 N.Y., 271, is not compulsory, but may be availed of at the election of employer and employee. As an inducement to employers to come under the act it is provided that in all actions for death or personal injury the defenses of assumption of risk and injury by a fellow-servant shall not avail. Thus if an employer elects not to come under the act he is liable under the common-law rules of negligence, but loses the important defense of assumption of risk and the fellow-servant defense; if the employer elects to come under the act but the employee does not, then the employee may retain his common-law action for injury but the employer also retains his common-law defenses, including the two above; if both employer and employee elect to come under the act the common-law action is superseded and compensation is given for all accidents short of such as are caused by wilful misconduct of the employee. A choice is, therefore, given to both employer and employee; but if the former fails to come under the act he loses two of his most important defenses; if the latter prefers to seek the possible high verdict sometimes given by juries in personal injury cases rather than to accept the relatively low but sure compensation under the act, then he is subject to be met by all defenses as heretofore.

The Wisconsin act is a great improvement over the New York act in that it applies to all employments while the New York act applied only to eight specified extra-hazardous employments. True, the Wisconsin act is elective while the New York act was compulsory, but the inducements under the Wisconsin act are so great that almost all large employers will wish to come under the act; and many of the largest employers have already filed their election.

In the New York case the principal objection urged against the constitutionality of the law seems to have been that to make

[1] 10 Minn., 78; 126 Mass., 557.

[2] Chap. 50, Laws of Wis., 1911.

an employer liable without his fault was a taking of property without due process of law.[1] In the Wisconsin case the chief objection was that to take away the fellow-servant and assumption-of-risk defenses in all employments, whether extra hazardous or not, is not due process of law. The first of these objections is the broader and includes the latter, but the Wisconsin court seems to treat the two in general terms as impliedly involved in each other. The question of the constitutionality of taking away the assumption of risk and fellow-servant defenses in extra-hazardous occupations is well settled in Wisconsin,[2] and even the New York court admits that this may constitutionally be done. The question remains, is it due process of law to make one liable without fault and to take away the said defenses in all occupations?

The constitution of Wisconsin does not contain a clause like the Fourteenth Amendment prohibiting the deprivation of life, liberty, or property without due process of law; but the court has sometimes had recourse to implied prohibitions in dealing with laws enacted under the police power[3]—a practice not warranted by reason or authority.[4] In the present case, however, the court does not have recourse to implied prohibitions nor does it expressly advert to the Fourteenth Amendment.

It is the general clauses of our constitutions, principally the due-process clause and the clause prohibiting the deprivation of the equal protection of the laws, which form the limitations of the police power; and it is to these clauses that the discussion of the court applies. It says:

> By what standards is this general language or general policy to be interpreted and applied to present-day people and conditions? . . . .
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> When an eighteenth-century constitution forms the charter of liberty of a twentieth-century government must its general provisions be construed and interpreted by an eighteenth-century mind surrounded by eighteenth-century conditions and ideals? Clearly not. This were to command the

[1] See the article on this case by James Parker Hall in *Journal of Political Economy*, XIX (October 1911), 694 ff.

[2] 138 Wis., 215; 142 Wis., 154; 62 Wis., 411; 71 Wis., 472.

[3] 134 Wis., 89, but see p. 115.

[4] Willoughby, *op. cit.*, secs., 24 ff.; Black, *Constitutional Law*, secs. 42 and 43, and cases cited.

race to halt in its progress, to stretch the state upon a veritable bed of Procrustes. . . . .

Where there is no express command or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight, but the changed social, economic, and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration, and become influential factors in the settlement of problems of constructions and interpretation. . . . .

The people, acting directly by means of a referendum, or through their representatives in constitutional conventions or legislative bodies are the makers of public policy, and it is only when the people have failed to speak in these methods that the courts can be said to have power to make public policy by decision.

This is remarkable language for a supreme court, even today. The battle as to the restraining power of the general clauses in our constitutions, and especially the due-process clause, has never been hotter than in this day of social reform and welfare work.

Our constitutions were created in the days when the natural rights theory of political philosophy and the *laissez-faire* theory of political economy were the prevailing doctrines. The function of the state was aptly described as that of a great policeman who was to stand by and see that the fight for existence took its course according to the inexorable natural laws, but who was under no circumstances to take a hand in the battle. It is this theory of non-interference that the founders meant to embody in the constitutions. This was their norm of social justice, their due process of law. In the words of Chief Justice Winslow:

A constitution is a very human document, and must embody with greater or less fidelity the spirit of the time of its adoption. It will be framed to meet the problems and difficulties which face the men who make it and it will generally crystallize with more or less fidelity the political, social and economic propositions which are considered irrefutable, if not actually inspired by the philosophers and legislators of the time; but the difficulty is that, while the constitution is fixed or very hard to change, the conditions and problems surrounding the people, as well as their ideals, are constantly changing. The political or philosophical aphorism of one generation is doubted by the next, and entirely discarded by the third; the race moves forward constantly and no Canute can stay its progress.

If the cardinal rule of construction, which is to seek the intent of the authors of an instrument, were followed by our courts in

interpreting constitutions little of our reform legislation could stand, because if it were held that the constitutions simply petrify the natural rights doctrine no state interference would then be possible. The issue would simply be between the natural rights theory of political philosophy and our later and more advanced views,[1] and the latter must give way because the former are embodied in a constitutional restriction. But our courts, having assumed the duty of determining the constitutionality of laws, early realized that to hold that due process of law was an immutable thing would close the door to progress and reform. So it is held that due process is a growing idea, evolving with social, political, economic, and cultural change.[2]

The natural-rights philosophy of law has long since been discarded by social and political science and the courts have slowly, consciously or unconsciously, abandoned it. Some courts still speak of natural liberty and natural rights and declare laws unconstitutional for violating these non-existent entities, apparently unaware of the inconsistency of permitting the many other increasing state functions which all courts, even the most orthodox, have permitted.[3]

Due process being a changing thing, what is its content at any given time? Under the police power the state may make such laws as are necessary for the general welfare of the people. What is necessary at a given time is a question of fact to be determined by science and statistics very often. Therefore, what is due process in legislation enacted under the police power is today very often a question of fact dependent on a study of social conditions and industrial and economic life. This is evidenced by the fact that in some of the latest cases concerning police laws briefs made up of statistics and quotations and monographs from writers on scientific subjects have been filed. It is evident that our courts must become students of social economics and the allied sciences to decide whether the increasing number of laws enacted under the police power to control our increasingly complicated economic

[1] Freund, *Police Power*, sec. 21.

[2] Hall, *op. cit.*, p. 697; 211 U.S., 78; 198 U.S., 45.

[3] Freund, *op. cit.*, sec. 433.

life are constitutional. This is a heavy demand to make upon our judges in view of the stupendous and accelerating growth of the volume of our case and statute law. It is due to this latter fact as well as to some deplorable shortcomings of legal education in the United States that some of our distinguished judges have shown themselves to be only lawyers. Due process of law as to economic reforms enacted under the police power of the state, such as the law under consideration, is the public policy of the time. But if, as the Wisconsin court says, legislatures are the makers of public policy then there would seem to be little left of the judicial function of deciding constitutionality in cases of this class.

Probably some of our more conservative courts will not subscribe to the broad statements of the Wisconsin court; but may we not expect our courts to take a more and more liberal attitude toward measures of this kind whose validity depends solely on questions of fact, and which are coming to be passed only after comprehensive investigation of the facts and the practices in other countries by commissions of experts much better able to judge of them than lawyers? It is refreshing to see with what care the Wisconsin act is drawn and what study must have preceded its framing and to compare it with some of the slovenly, haphazard legislation to which we have been accustomed. Why should not our courts be very loath to hold invalid laws based upon such thorough legislative examinations of conditions and problems by commissions of experts?[1]

There are minor constitutional questions in the Wisconsin act some of which were decided and some of which remain undecided and of doubtful validity. Such a one is the provision that persons refusing to obey the subpoena of the commission created by the act or one of its examiners shall be punished for contempt by the circuit court.[2] But none of these provisions affect the validity of the act as a whole. The objection that the act deprives suitors of a trial by jury as guaranteed by the constitutions, which is

[1] See articles of Samuel A. Harper in Ill. Law Review, VI. 170, 255, on the work of the Illinois Commission.

[2] 131 Ind., 47; 16 L.R.A., 108; 168 N.Y., 89; 154 U.S., 447; 56 L.R.A., 855.

considered one of the serious obstacles in the way of such legislation,[1] does not seem to have been raised in the Wisconsin case. Perhaps, a sufficient answer to it would have been that inasmuch as jury trial may be waived in Wisconsin,[2] the election to come under the act is a waiver of this right.

The objection that the act gives an administrative board judicial powers and permits it to determine conclusively questions of law and fact is answered by the court by calling attention to the fact that such commissions have been sustained in this and other states and that the act gives an appeal to the circuit court and from thence to the supreme court on the grounds: (1) that the board acted without or in excess of its jurisdiction; (2) that the award was procured by fraud; (3) that the findings of facts by the board do not support the award. There was no attempt here to give the board the power of conclusive determination of the jurisdictional facts—another evidence of the care with which the act was drawn.

On the whole the decision is all that the advocates of workmen's compensation could wish for; the plan as worked out is sustained *in toto*, and the United States sees its first[3] constitutional workmen's compensation law of general application in operation—a law which, though elective, offers such important inducements to both employer and employee that it is likely to find very general application and, in time, to be the sole recourse of our great army of industrial workers.

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[1] S. A. Harper, *op. cit.*, 170 ff.; Hall, *op. cit.*, 695.

[2] Constitution of Wisconsin, Art. 1, sec. 5.

[3] The Washington act, sustained in *State ex rel.* v. *Clausen*, 117 Pacific, 1101, is a compulsory workmen's insurance law.